No. 84-1360

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CITY OF RENTON, et al.,

Appellants,

v.

PLAYTIME THEATERS, INC., et al.,

Appellees.

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

BRIEF OF THE FREEDOM COUNCIL FOUNDATION AMICUS CURIAE, IN SUPPORT OF APPELLANTS

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INTEREST OF AMICUS CURIAE[1]

The Freedom Council Foundation is gravely concerned about the threat posed by obscenity and nonobscene erotic material[2] to the family and to society generally. The Court's disposition of this case may dramatically affect the power of cities and states to regulate that threat.

The Freedom Council Foundation is a nonprofit corporation organized to defend, restore, and preserve religious liberties, family rights, and other freedoms guaranteed by the Constitution. The Foundation is affiliated with the Freedom Council, which has associated organizations in each of the 50 states, and student groups on over 70 college campuses. The Foundation is also related to the Christian Broadcasting Network, which is one of the two largest cable television networks in the United States, reaching over 13 million homes. The Council and Foundation have filed amicus curiae briefs in *Lynch v. Donnelly* and other cases before this Court and other courts.

The counsel of record for Amicus Curiae, Wendell R. Bird, concentrates in constitutional litigation, has published articles on the First Amendment in the *Yale Law Journal* and *Harvard Journal of Law & Public Policy*, and is an Adjunct Professor at Emory University School of Law in constitutional law. The Foundation hopes that this expertise will be of assistance to the Court in this case.

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1. A motion for leave to file accompanies this brief, pursuant to S.Ct. Rule 36.2.

2. Amicus Curiae, in arguing that nonobscene erotic material is not fully protected expression under the reasoning of *Young v. American Mini Theatres, Inc.*, assumes arguendo but does not concede that such material is properly viewed as even partly protected by the First Amendment.

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STATEMENT OF THE CASE

This appeal involves the constitutionality of a municipal zoning ordinance regulating adult theaters that is very similar to the zoning ordinance upheld by this Court in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) (plurality opinion of Stevens, Burger, White & Rehnquist, JJ.). The Ninth Circuit summarized the City of Renton's ordinance as follows:

> In April, 1981, the City of Renton enacted ordinance number 3526 which prohibited any "adult motion picture theater"[1] within one thousand feet of any residential zone or single or multiple family dwelling, any church or other religious institution, and any public park or area zoned for such use. The ordinance further prohibited any such theater from locating within one mile [later amended to one thousand feet] of any public or private school.[3]

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3. The Ninth Circuit quoted the ordinance's definitions as follows:

   1. The first ordinance defined an "adult motion picture theater" as "an enclosed building used for presenting motion picture films, video cassettes, cable television, or any other such visual media, distinguished or characterized by an emphasis on matter depict-

Playtime Theaters, Inc. v. City of Renton, 748 F.2d 527, 529-30 (9th Cir. 1984). The "distinguished or characterized by" language, and the "specified sexual activities" and "specified anatomical areas"[4] definitions, are essentially identical to the ordinance upheld in *Mini Theatres*. The city heard the testimony of several witnesses before passing the ordinance, and later added numerous reasons that were generally based on pornography's blight on neighborhoods and families (particularly children).[5] Because Renton is a small town, it did not undertake a costly study of probable adult theater blight; and because it is a suburb of Seattle, it assumed it would encounter harms similar to those experienced by Seattle.[6]

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ing, describing or relating to "specified sexual activities" or "specified anatomical areas" as hereafter defined, for observation by patrons therein.

The ordinance defined these terms as follows:

2. "*Specified Sexual Activities*":
(a) Human genitals in a state of sexual stimulation or arousal;
(b) Acts of human masturbation, sexual intercourse or sodomy;
(c) Fondling or other erotic touching of human genitals, pubic region, buttock or female breast.
3. "*Specified Anatomical Areas*":
(a) Less than completely and opaquely covered human genitals, pubic region, buttock, and female breast below a point immediately above the top of the areola; and
(b) Human male genitals in a discernible turgid state, even if completely and opaquely covered.

The second ordinance expanded the defined term of "used" as:
a continuing course of conduct of exhibiting "specific [sic specified] sexual activities" and "specified anatomical area["] in a manner which appeals to a prurient interest.

Id. at 529 n.1.

4. The term "erotic material" is used throughout this brief, as in *Mini Theatres*, to refer to nonobscene material "distinguished or characterized by an emphasis on matter depicting, describing or relating to 'specified sexual activities' or 'specified anatomical areas' "—*i.e.*, to nonobscene sexually explicit material.

5. Br. of Appellants at 6; 748 F.2d at 530-31 n.3.

6. Br. of Appellants at 7-8; 748 F.2d at 531 n.3.

SUMMARY OF THE ARGUMENT

This pornography zoning ordinance should be upheld as constitutional on the ground that nonobscene erotic material is only partially protected expression, under the analysis of the four justice plurality in *Young v. American Mini Theatres, Inc.*[7] There, Justice Stevens, joined by Chief Justice Burger, and Justices White and Rehnquist, held that nonobscene "erotic material" does not constitute fully protected expression:

> [T]here is surely a *less vital interest* in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance
>
> . . ..
>
> . . ..
>
> [I]t is manifest that society's *interest in protecting this type of [erotic] expression is of a wholly different, and lesser, magnitude* than the interest in untrammeled political debate that inspired Voltaire's immortal comment. . . . Even though the First Amendment protects communication in this area from total suppression, we hold that the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures.[8]

This partial protection of erotic material is analogous to the partial level of constitutional protection of commercial advertising, which this Court has consistently acknowledged over the past decade. Partial protection permits a greater degree of regulation than fully protected expression would allow, and requires the upholding of regulation of erotic material such as Renton's ordinance for pornography zoning.

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7. 427 U.S. at 70-71.

8. *Id.* at 61, 70-71 (emphasis added).

ARGUMENT

ZONING REGULATION OF NONOBSCENE EROTIC MATERIAL IS CONSTITUTIONAL UNDER THE FIRST AMENDMENT, BECAUSE SUCH EROTIC MATERIAL IS ONLY PARTIALLY PROTECTED EXPRESSION.

The brief discusses (A) the only partial protection of the First Amendment for nonobscene erotic material and commercial advertising; (B) the lack of a burden on such erotic material from greater regulation, including Renton's zoning regulation, that partial protection allows; and (C) the justification for any nonsuppressive burden by the legitimate state interest test or commercial advertising test that applies to partially protected expression.

I. ONLY PARTIAL PROTECTION OF THE FIRST AMENDMENT EXTENDS TO NONOBSCENE EROTIC MATERIAL AND COMMERCIAL ADVERTISING.

The full First Amendment protection is not applied to every spoken or printed word or illustration, because that Amendment does not extend absolutely to every utterance.[9] No first Amendment protection extends to fighting words,[10] to terroristic or extortionate threats,[11] to immediate seditious advocacy, [12] or to criminally instrumental words,[13] because such utterances are merely verbal conduct tantamount to nonverbal physical attack, subversion, or crime. Similarly, no speech or press protection extends to noninformative or false

9. *E.g.*, Miller v. California, 413 U.S. 15, 23 (1973); Konigsberg v. State Bar, 366 U.S. 36, 49-51 (1961).

10. *E.g.*, Cox v. Louisiana, 379 U.S. 559, 563 (1965); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).

11. *E.g.*, Watts v. United States, 394 U.S. 705, 707 (1969); Masson v. Slaton, 320 F. Supp. 669, 672 (N.D. Ga. 1970).

12. *E.g.*, Scales v. United States, 367 U.S. 203, 228-29 (1961); Dennis v. United States, 341 U.S. 494, 501-02 (1951) (plurality opinion).

13. *E.g.*, Cox v. Louisiana, 379 U.S. 559, 563 (1965); Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949).

commercial advertising,[14] to nonprivileged defamation,[15] or to obscenity and child pornography.[16] Obscene material is not protected speech or press because it, taken as a whole, is physical stimulation through nonideational verbal or pictoral incitement.[17]

A. *This Court Has Recognized a Category of Partially Protected Expression such as Commercial Advertising.*

While the "First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent,"[18] that does not require that the freedoms of speech and press *fully* protect other expression that lacks such serious ideational or communicative value and instead is wholly commercial, essentially conduct, or erotic. Only *partial* First Amendment protection extends to primarily commercial but informative advertising, to privileged defamation, and to erotic publications and films.

For example, "the Constitution accords less protection to commercial speech than to other constitutionally safeguarded forms of expression," as this Court has held in many

14. *E.g.*, Central Hudson Gas & Elec. Corp. v. Pub. Service Comm'n, 447 U.S. 557, 563 (1980); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973).

15. *E.g.*, New York v. Ferber, 458 U.S. 747, 763 (1982); Beauharnais v. Illinois, 343 U.S. 250, 266 (1952).

16. *E.g.*, Brockett v. Spokane Arcades, Inc., ___ U.S. ___ (1985); New York v. Ferber, 458 U.S. at 764; Miller v. California, 413 U.S. at 23; Roth v. United States, 354 U.S. 476, 481, 485 (1957); Schauer, *Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899 (1979) (defending two-level approach to obscenity as unprotected).

17. *E.g.*, D. BARBER, PORNOGRAPHY AND SOCIETY 91 (1972); Schauer, *supra* note 16, at 922-23 ("the prototypical pornographic item on closer analysis shares more of the characteristics of sexual activity than of the communicative process" and is "a sexual surrogate").

18. *E.g.*, Miller v. California, 413 U.S. at 34.

decisions such as *Bolger v. Youngs Drug Products Corp.*,[19] although advertising enjoys some First Amendment protection.[20]

> In rejecting the notion that such speech "is wholly outside the protection of the First Amendment," *Virginia Pharmacy, supra*, at 761, we were careful not to hold "that it is wholly undifferentiable from other forms" of speech. 425 U.S., at 771 n.24. We have not discarded the "common-sense" distinction between speech proposing a commercial transaction . . . and other varieties of speech. *Ibid.* To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a *limited measure of protection*, commensurate with its *subordinate position* in the scale of First Amendment values. . . .[21]

Because of this partial protection, the First Amendment "allow[s] modes of regulation that might be impermissible in the realm of noncommercial expression."[22]

Similarly, only partial First Amendment protection extends to privileged defamation. While false statements are

19. 463 U.S. 60, 77 L.Ed.2d 468, 476 (1983).

20. *E.g.*, Bates v. State Bar, 433 U.S. 350, 363-64 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 761 (1976).

21. *E.g.*, Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455-56 (1978) (emphasis added). *Accord*, Central Hudson Gas & Elec. Corp. v. Pub. Service Comm'n, 447 U.S. at 562-63; Friedman v. Rogers, 440 U.S. 1, 10-11 n.9 (1979); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. at 771-72 n.24; *see generally* Note, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 44 U. CHI. L. REV. 205, 222-54 (1976).

22. Ohralik v. Ohio State Bar Ass'n, 436 U.S. at 556. *Accord, e.g.*, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. at 771-72 & n.24; Section III(A) *infra*.

not fully protected speech,[23] this Court has ruled that some "erroneous statement . . . must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive,' "[24] which the Court has interpreted as "extending a measure of strategic protection to defamatory falsehood."[25] Hence some false statements are "constitutionally privileged" and thereby effectively given partial protection from suppression and some regulation.[26] Like partially protected commercial advertising, however, privileged defamation can be subjected to state regulation[27] that for fully protected speech and press would not be permitted.

B. *This Court Has Placed Nonobscene Erotic Material in that Partially Protected Category.*

Although the "portrayal of sex, *e.g.*, in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press,"[28] that principle does not mean that sexual acts or similar conduct are protected by the First Amendment at all,[29] and it does not demand the same degree of protection for erotic material as for traditionally protected speech and press.[30] Instead, only partial First Amendment protection ex-

23. *See, e.g.*, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. at 771; Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974).

24. *E.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 271-72 (1964).

25. *E.g.*, Gertz v. Robert Welch, Inc., 418 U.S. at 342.

26. This is true for false statements about public figures without actual malice, and about private persons without the requisite degree of fault. *E.g.*, Gertz v. Robert Welch, Inc., 418 U.S. at 347; New York Times Co. v. Sullivan, 376 U.S. at 279-80.

27. *E.g.*, Gertz v. Robert Welch, Inc., 418 U.S. at 347; Section II(C) *infra*.

28. Roth v. United States, 354 U.S. at 487 (footnote omitted). *E.g.*, Schad v. Village of Mt. Ephraim, 452 U.S. 61, 66 (1981) (nudity).

29. *E.g.*, Paris Adult Theatre I v. Slaton, 413 U.S. 49, 66 & n.13 (1973); Lovisi v. Slayton, 539 F.2d 349, 351-52 (4th Cir. 1976).

30. Ascribing only partial First Amendment protection to erotic material does not reduce the constitutional protection for such expression; instead, it results from the relatively recent shift of erotic material from the unpro-

tends to nonobscene erotic material as defined in Renton's ordinance.

This Court acknowledged the "lesser" First Amendment protection for nonobscene erotic material in the plurality opinion in *Young v. American Mini Theatres, Inc.*:

> [T]here is surely a *less vital interest* in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance . . .."[31]
>
> [E]ven though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's *interest in protecting this type of expression is of a wholly different, and lesser*, magnitude than the interest in untrammeled political debate that inspired Voltaire's immortal comment. Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theaters of our choice.[32]

The Court's finding of a "lesser" First Amendment protection for erotic material was clearly the premise for its findings that reasonable regulation of such material does not abridge freedoms of speech and press and that content-based regulation

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tected category to some protection. *E.g.*, Schauer, *supra* note 16, at 907-08 & n.50 (courts have given First Amendment protection but reduced its level in such areas as nonobscene erotic material and nonobscene indecent language); *compare* F. SCHAUER, THE LAW OF OBSCENITY 21-22 (1976) (in obscenity prosecutions in the nineteenth century, "almost anything that concerned sexual relationships in any way was presumed to be obscene") *and* Commonwealth v. Holmes, 17 Mass. 336 (1821) (example of same) *with* Miller v. California, 413 U.S. at 24 (narrow test for obscenity).

31. *Id.* at 61 (plurality opinion) (emphasis added).

32. *Id.* at 70 (plurality opinion) (emphasis added).

of sexually explicit material does not violate equal protection.[33]

Other decisions, besides *Mini Theatres* and the advertising and libel analogies, support the proposition that erotic material is only partially protected expression. This Court in *FCC v. Pacifica Foundation*,[34] in sustaining a statutory prohibition against broadcast of nonobscene "indecent" speech under the First Amendment,[35] permitted regulation of sexually explicit expression[36] that would not have been constitutionally permissible for fully protected speech or press. That ruling indicates a lesser First Amendment protection for such nonobscene material; and the plurality opinion stated that such "patently offensive references to excretory and sexual organs and activities" "lie at the periphery of First Amendment concern," and that "[t]heir place in the hierarchy of First Amendment values was . . . 'no essential part of any exposition of ideas' . . . ."[37] The Court in *California v. LaRue*,[38] in upholding a regulation of sexually explicit dancing, films, and pictures in bars with liquor licenses, also recog-

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33. *E.g.*, *id.* at 96 (dissenting justices' "forthright rejection of the notion that First Amendment protection is diminished for 'erotic materials' "); Stansberry v. Holmes, 613 F.2d 1285, 1288 (5th Cir.) ("*Young* affords certain 'speech' activities lesser protection"), *cert. denied*, 449 U.S. 886 (1980); Note, *Constitutional Law—First Amendment—Content Neutrality, Young v. American Mini Theatres, Inc.*, 28 CASE W. RES. L. REV. 456, 478 (1978) (same); Comment, *The Supreme Court, 1976 Term—Constitutional Law*, 90 HARV. L. REV. 58, 200 (1976) (same).

34. 438 U.S. 726 (1978).

35. *Id.* at 744 (plurality opinion); *id.* at 756, 761 (Powell, J., concurring).

36. *Id.* at 743.

37. *Id.* at 743, 746.

38. 409 U.S. 109, 118 (1972). *See* New York State Liquor Auth. v. Bellanca, 452 U.S. 714, 715-18 (1981) (upholding prohibition of topless dancing in establishments with liquor licenses as "a reasonable restriction"); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) (upholding regulation, *inter alia*, of "Group D cabarets" with partially nude performance, on the basis of legitimate state interest); *cf.* Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 65 (1981) (overturning ban on all live entertainment [whether or not partially protected] in commercial zones); Doran v. Salem Inn, Inc., 422

nized the lesser First Amendment protection of such erotic entertainment and materials as compared with political, artistic, literary, and scientific speech and press. The majority opinion said that, while "at least some of the performances [and films and pictures] to which these regulations address themselves are within the limits of the constitutional protection of freedom of expression," they are not "the constitutional equivalent of a performance by a scantily clad ballet troupe in a theater."[39] Consequently, "as the mode of expression moves from the printed page to the commission of public acts that may themselves violate valid penal statutes, the scope of permissible state regulations significantly increases."[40]

The obscenity decisions, in *Miller v. California*[41] and other cases, have implicitly found less constitutional protection for sexually explicit material on the periphery of obscenity. These decisions have permitted variation in the three factors constituting obscenity, with the effect of shifting erotic material into the obscenity category in some cases and out of that unprotected category in others; such variation would not be permissible for fully protected speech and press. That variation includes patent offensiveness as determined by different community standards,[42] prurient appeal as influenced by the deviant nature of the recipient group,[43] and all three *Miller* factors as adjusted for the minority age of the recipient individuals.[44]

The reason why full First Amendment protection does not apply to sexually explicit material is that primarily erotic

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U.S. 922, 933-34 (1975) (overturning regulation not limited to liquor licensed establishments).

39. 409 U.S. at 118.

40. *Id.* at 117. *Accord*, Doran v. Salem Inn, Inc., 422 U.S. at 932.

41. 413 U.S. 15, 25-26 (1973).

42. *Id.* at 30.

43. *E.g.*, Mishkin v. New York, 383 U.S. 502, 508-09 (1966).

44. *E.g.*, Ginsberg v. New York, 390 U.S. 629, 638 (1968); *see* New York v. Ferber, 458 U.S. 747 (1982) (child pornography).

books, magazines, and motion pictures consist of commercial noncommunicative sexual conduct, and that purchasers and authors and vendors of such erotic materials are carrying on commercial noncommunicative action rather than sincerely conveying any First Amendment expression.[45] As with advertising, anything more than partial protection for erotic material "could invite dilution, simply by a leveling process, of the force of the [First] Amendment's guarantee with respect to the latter kind of speech."[46]

II. NO BURDEN ON FIRST AMENDMENT EXPRESSION ARISES FROM ZONING REGULATION OF NONOBSCENE EROTIC MATERIAL, BECAUSE GREATER REGULATION IS CONSTITUTIONALLY PERMISSIBLE FOR SUCH EROTIC MATERIAL.

A. *Greater Regulation Is Permissible for Commercial Advertising and Erotic Material than for Fully Protected Expression.*

For commercial advertising, this Court's decisions "allow[] modes of regulations that might be impermissible in the realm of non-commercial expression."[47] The state can prohibit misleading and deceptive as well as false advertisements,[48] suppress advertising concerning illegal transac-

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45. *See, e.g.*, Young v. American Mini Theatres, Inc., 427 U.S. at 70; California v. LaRue, 409 U.S. at 118 ("in the form of movies or live entertainment, 'performances' that partake more of gross sexuality than of communication"); Schauer, *Response: Pornography and the First Amendment*, 40 U. PITT. L. REV. 605, 608 (1979) ("none of the philosophical justifications of a distinct concept of freedom of speech would put direct sexual excitement within the confines of that principle"); Schauer, *supra* note 16. Erotic material is closer to obscenity, prostitution, sexual solicitation, and non-artistic public nudity than to traditional speech.

46. Central Hudson Gas & Elec. Corp. v. Pub. Service Comm'n, 447 U.S. at 563 n.5, *quoting* Ohralik v. Ohio State Bar Ass'n, 436 U.S. at 456.

47. Friedman v. Rogers, 440 U.S. at 10-11 n.9, *quoting* Ohralik v. Ohio State Bar Ass'n, 436 U.S. at 456. *Accord, e.g.*, In re R.M.J., 455 U.S. 191, 203 (1982).

48. *E.g.*, Bolger v. Youngs Drug Products Corp., ___ U.S. ___, 77 L.Ed.2d at 479; In re R.M.J., 455 U.S. at 203; Friedman v. Rogers, 440 U.S.

tions,[49] require necessary warnings or disclaimers on commercial advertisements,[50] and prohibit attorneys' solicitation for nonideological litigation or broadcast advertising for cigarettes.[51]

For erotic material, greater regulation and restriction (short of total prohibition) is also permissible than would be constitutional for fully protected expression, as this Court's decisions in *Mini Theatres*, *Bellanca*, *LaRue*, and *Pacifica* evince.[52]

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at 9; Bates v. State Bar, 433 U.S. 350, 383 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. at 771-72 & n.24.

49. *E.g.*, Bolger v. Youngs Drug Products Corp., ___ U.S. ___, 77 L.Ed. 2d at 479; Village of Hoffman Estates v. Flipside, 455 U.S. 489, 496 (1982); Bates v. State Bar, 433 U.S. at 384; Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. at 388.

50. *E.g.*, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. at 772 n.24; Warner-Lambert Co. v. FTC, 562 F.2d 749, 758-59 (D.C. Cir. 1977).

51. *E.g.*, Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978); Capital Broadcasting Co. v. Mitchell, 33 F.Supp. 582 (D.D.C. 1971), *aff'd mem. sub nom.* Capital Broadcasting Co. v. Acting Att'y Gen'l, 405 U.S. 1000 (1972).

52. Section I(B) *supra*. *Schad* is not contrary to this rule, because the ordinance excluded all live entertainment from commercial zones, and thereby "prohibit[ed] a wide range of expression that has long been held to be within the protections of the First and Fourteenth Amendments," 452 U.S. at 65, as well as prohibiting partially protected nude dancing in adult establishments. *Doran* is also not contrary, because it found unconstitutional a total prohibition of topless dancing in establishments without liquor licenses that would have been constitutional if limited to establishments with liquor licenses. New York State Liquor Auth. v. Bellanca, 452 U.S. 714, 716-17 (1981) (per curiam). *Vance v. Universal Amusement Co.* is not contrary, because it involved total prohibition of erotic material under a public nuisance statute without a judicial finding of obscenity. 445 U.S. 308 (1980) (per curiam). And *Erznoznik* is not contrary. Note 77 *infra*.

B. *Greater "Time, Place, and Manner" Regulations Are Permissible for Commercial Advertising and Erotic Material than for Fully Protected Expression.*

Greater regulation of the "time, place, or manner" of expression is permitted for partially protected expression[53] than the First Amendment permits for fully protected speech.[54]

The Renton zoning ordinance is a permissible "time, place or manner" restriction. It closely resembles the ordinance in *Mini Theatres* by prohibiting adult theaters within 1,000 feet of a residential area (or school, church, or public park), just as Detroit prohibited them within 500 feet of residential areas. *Mini Theatres* found such pornography zoning to involve the permissible regulation of "nothing more than a limitation on the place where adult films may be exhibited."[55] That decision found ordinances concentrating adult theaters (as in Renton) to come within the same constitutional rationale as ordinances dispersing them.[56]

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53. *E.g.*, Note, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 44 U. CHI. L. REV. 205, 240-41 (1976) (greater "degrees of time, place, and manner regulation" are permitted by "the different first amendment value of . . . commercial speech" or " 'sexually explicit films' "); *see* Section II(A) *supra* (greater regulation permitted for commercial advertising than for fully protected speech).

54. *E.g.*, Grayned v. City of Rockford, 408 U.S. 104, 115 (1972); Cox v. New Hampshire, 312 U.S. 569, 576 (1941).

55. 427 U.S. at 71 (emphasis added). *Accord, id.* at 78-79 (Powell, J., concurring) ("ordinance is addressed only to the places at which this type of expression may be presented"); *e.g.*, Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821, 826 (4th Cir. 1979), *cert. denied*, 447 U.S. 929 (1980); Northend Cinema, Inc. v. City of Seattle, 90 Wash. 2d 709, 585 P.2d 1153, 1158 (1978) (en banc) ("We conclude the zoning regulation of location of adult movie theaters is a reasonable regulation of place for First Amendment speech which does not violate First Amendment freedoms."), *cert. denied*, 441 U.S. 946 (1979).

56. The opinion stated:

> [W]e have no doubt that the municipality may control the location of theaters as well as the location of other commercial establishments, either *by confining them to certain specified commercial zones* or by

The Renton ordinance will not "suppress or greatly restrict access to lawful speech,"[57] in any event, any more than the Detroit ordinance permissibly did. As in *Mini Theatres*, the regulation does not "impose a limit on the total number of adult theaters which may operate," prohibit market entry by "distributors or exhibitors of adult films" or publications, or render "the viewing public . . . unable to satisfy its appetite for sexually explicit fare."[58] The appellees do not argue that they and competitors cannot find land among the 520 available acres inside Renton (which amounts to 5.4% of its total acreage); pornography shops have no constitutional right to locate in or near residential zones and schools. The "economic loss for some who are engaged in this business" because of Renton's ordinance similarly does not amount to a constitutional violation, as in *Mini Theatres*.[59] Partially protected erotic material, like commercial advertising, "may be more durable than other kinds" of speech and press because through its integral relation to "commercial profits . . . there is little likelihood of its being chilled by proper regulation and foregone entirely."[60]

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requiring that they be dispersed throughout the city. The mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not a sufficient reason for invalidating these ordinances.

427 U.S. at 62 (emphasis added). Analogous regulation of the "manner" of adult establishment commerce, through prohibiting offensive displays in their storefronts, is also constitutional. *E.g.*, Dover News, Inc. v. City of Dover, 117 N.H. 1066, 381 A.2d 752, 755-56 (1977); *see* Borrago v. City of Louisville, 456 F. Supp. 30, 32 (W.D. Ky. 1978); Comment, *Developments in the Law—Zoning*, 91 HARV. L. REV. 1427, 1562-63 & n.81 (1978) ("hours" regulation of adult establishments would conform to First Amendment).

57. 427 U.S. at 71 n.35.

58. *Id.* at 62.

59. *Id.* at 78 (Powell, J., concurring).

60. *E.g.*, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. at 772 n.24. *See also* Central Hudson Gas & Elec. Corp. v. Pub. Service Comm'n, 447 U.S. at 571 n.13.

C. *Content-Based Classification and Regulation Is Permissible for Commercial Advertising and Erotic Material.*

The rule for fully protected expression, that "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content,"[61] is not absolute but "qualified."[62] That content classification rule does not apply to partially protected speech.

For commercial advertisements, "the content of a particular advertisement may determine the extent of its protection."[63] "[C]ontent-based restrictions on commercial speech may be permissible," with unequal regulatory treatment of partially protected and fully protected advertising, under the First Amendment and the equal protection clause.[64] And for defamation, "the rule to be applied depend[s] on the content of the communication," as *Mini Theatres* noted.[65] In defamation law, content-based classification and disparate treatment include different regulatory standards of liability for

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61. *E.g.*, Police Dep't v. Mosley, 408 U.S. 92, 95 (1972).

62. Young v. American Mini Theatres, Inc., 427 U.S. at 65. *E.g.*, note 64 *infra*.

63. *Id.* at 68. *Accord, e.g.*, Bates v. State Bar, 433 U.S. at 363 ("If commercial speech is to be distinguished, it 'must be distinguished by its content.' ").

64. Bolger v. Youngs Drug Products Corp., ____ U.S. ____, 77 L.Ed.2d at 476. *E.g.*, Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) (banishing signs advertising off-premises enterprises but not on-premises ones); Friedman v. Rogers, 440 U.S. 1 (1979) (prohibiting optometrists' but not others' use of trade names); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771-72 & n.24 (1976) (prohibiting misleading and false advertisements but allowing other advertisements); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (plurality opinion) (public transit system selling placard space for commercial advertisements but not for political ones).

65. 427 U.S. at 67 (plurality opinion).

defamation of public figures and of private citizens,[66] disparate regulation of defamation involving public controversies and only private affairs,[67] and different treatment of defamation of racial or religious groups and defamation of others.[68]

For erotic materials, similarly, the plurality in *Mini Theatres* "h[e]ld that the State may legitimately use the content of these [sexually explicit] materials as the basis for placing them in a different classification from other motion pictures."[69] This sort of content-based classification and regulation is supported by *Pacifica Foundation*, sustaining a FCC prohibition against nonobscene "indecent" language "based in part on its content"[70]; and *LaRue*, upholding a municipal proscription of nonobscene erotic dancing or movies while permitting other dancing and movies where liquor was served.[71] In fact, not classifying and discriminating between the content of erotic and non-erotic theaters and bookstores

66. *Compare* New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) *with* Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974); FCC v. Pacifica Foundation, 438 U.S. 726, 745 (1978) (plurality opinion).

67. *Compare* Time, Inc. v. Hill, 424 U.S. 448, 453-55 (1976) *with* Gertz v. Robert Welch, Inc., 418 U.S. at 345.

68. *E.g.*, Beauharnais v. Illinois, 343 U.S. 250, 263 (1952).

69. 427 U.S. at 70-71. *See, e.g.*, New York v. Ferber, 458 U.S. at 766 n.18 ("Today, we hold that child pornography . . . is unprotected speech subject to content-based regulation."); Hart Book Stores, Inc. v. Edmisten, 612 F.2d at 830-31.

70. FCC v. Pacifica Foundation, 438 U.S. at 744 (plurality opinion).

71. California v. LaRue, 409 U.S. 109 (1972); *compare id.* at 138 (Marshall, J., dissenting) ("[T]his classification . . . discriminates . . . on the basis of the *content* of their speech. Thus, California nightclub owners may present live shows and movies dealing with a wide variety of topics . . .. But if they choose to deal with sex, they are treated quite differently.") (emphasis in original) *with* Comment, *Constitutional Law: Municipal Zoning Ordinance May Restrict Location of Adult Motion Picture Theatres*, 16 WASHBURN L.J. 479, 486 & n.52 (1977) (same); *cf.* New York State Liquor Auth. v. Bellanca, 452 U.S. at 715-18 (upholding ban on topless dancing in liquor licensed establishments).

might violate the equal protection clause, as Justice Powell noted,[72] or the First Amendment.[73]

D. *The Overbreadth Rule Is Inapplicable to Commercial Advertising and Erotic Material.*

The overbreadth rule[74] does not apply to partially protected expression. This Court has held that "the overbreadth doctrine does not apply to commercial speech."[75]

The majority in *Mini Theatres*, in denying standing for a vagueness challenge, gave a rationale that applies equally to an overbreadth attack:

> Since there is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance, and since the limited amount of uncertainty in the ordinance is easily susceptible of a narrowing construction, we think this is an inappropriate case in which

72. 417 U.S. at 82.

73. The prior restraint rule also might not apply to erotic material, just as for commercial advertising the "different degree of protection" "may also make inapplicable the prohibition against prior restraints." Friedman v. Rogers, 440 U.S. at 10, *quoting* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. at 772 n.24. *Accord, e.g.*, Central Hudson Gas & Elec. Corp. v. Pub. Service Comm'n, 447 U.S. at 571 n.13; *see* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 464 (1978) (upholding bar rules against partially protected attorneys' solicitation "whose objective is the prevention of harm before it occurs"); Comment, *FTC v. Simeon Management Corp.: The First Amendment and the Need for Preliminary Injunctions of Commercial Speech*, 1977 DUKE L.J. 489, 501-10 (injunctions against commercial speech do not violate prior restraint rule). The prior restraint rule does not apply to unprotected expression such as obscenity. Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957); Near v. Minnesota, 283 U.S. 697, 716 (1931).

74. *E.g.*, Bigelow v. Virginia, 421 U.S. 809, 816-17 (1975); Laird v. Tatum, 408 U.S. 1, 13-14 (1972).

75. Village of Hoffman Estates v. Flipside, 455 U.S. at 497. *Accord, e.g.*, Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 635 (1980); Bates v. State Bar, 433 U.S. at 380-81.

> to adjudicate the hypothetical claims of persons not before the Court.
>
> . . . . The fact that the First Amendment protects some, though not necessarily all, of that material from total suppression does not warrant the further conclusion that an exhibitor's doubts . . . involves the kind of threat to the free market in ideas and expression that justifies the exceptional approach [of overbreadth standing] to constitutional adjudication recognized in cases like *Dombrowski* . . ..[76]

The decisions in *Pacifica Foundation* and *LaRue* support this point.[77]

Pornography zoning ordinances, in any event, are not overly broad on the ground that they apply to nonobscene erotic material as well as to obscene material, for two reasons. Any overbreadth is not "real and substantial"[78] in that few if any fully protected activities are affected, and none is burdened, by a location restriction for adult enterprises; and any overbroad element is readily susceptible to a limiting construction by the state courts.[79] Moreover, no overbreadth arises from such "time, place, and manner" regulations.

76. 427 U.S. at 61.

77. FCC v. Pacifica Foundation, 438 U.S. at 743 (plurality opinion) (because such "references to excretory and sexual organs and activities" "lie at the periphery of First Amendment concern," the Court "decline[d] to administer that medicine" of "[i]nvalidating any rule on the basis of its hypothetical application to situations not before the Court"); *see* California v. LaRue, 409 U.S. 109, 118-19 & n.5 (1972) (the Supreme Court there "refused to apply the overbreadth doctrine" to regulation of sexually explicit dancing, films, and pictures in establishments with state liquor licenses).

Although *Erznoznik* found an ordinance overbroad that prohibited exhibition of films containing any nudity and visible from public streets, it involved fully protected expression that was impermissibly regulated through the ordinance's overbreadth as well as (partially protected) sexually explicit films that were as here permissibly regulated. *Id.* at 213; Note, *Using Constitutional Zoning to Neutralize Adult Entertainment—Detroit to New York*, 5 FORDHAM URB. L.J. 455, 463 (1977). It was distinguished on this basis by a majority in *Mini Theatres*. 427 U.S. at 72 n.35 (plurality opinion); *id.* at 83 (Powell, J., concurring).

78. *E.g.*, Parker v. Levy, 417 U.S. 733, 760 (1974); Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

III. A JUSTIFICATION FOR MOST NONSUPPRESSIVE BURDENS EXISTS FOR ZONING AND OTHER REGULATION OF NONOBSCENE EROTIC MATERIAL, BECAUSE SUCH BURDENS MUST ONLY MEET THE LEGITIMATE STATE INTEREST TEST OR THE COMMERCIAL ADVERTISING TEST FOR PARTIALLY PROTECTED EXPRESSION.

For fully protected First Amendment interests, only a compelling state interest served by the least burdensome means will justify a direct burden.[80] And only an important or substantial governmental interest served by the least restrictive means will justify an incidental burden on such interests, under the *O'Brien* test.[81] For partially protected First Amendment interests such as erotic material, no preferred freedom or fundamental right is involved, and a lesser state interest with a greater range of means is sufficient to justify a reasonable regulation short of a total proscription.

A. *The O'Brien Test Does Not Apply to Regulation of Commercial Advertising or Erotic Material.*

The *O'Brien* test does not apply to pornography zoning and other regulation of erotic material, because the test is designed for incidental burdens on fully protected speech intertwined with conduct rather than on partially protected expression (whether or not intertwined with conduct).[82] That is evident in this Court's decision *not* to apply the *O'Brien* test

79. *E.g.*, Young v. American Mini Theatres, Inc., 427 U.S. at 61; *see* Erznoznik v. City of Jacksonville, 422 U.S. at 216; Broadrick v. Oklahoma 413 U.S. at 613.

80. *E.g.*, NAACP v. Button, 371 U.S. 415, 438, 439 (1963); Bates v. City of Little Rock, 361 U.S. 516, 524 (1960).

81. *E.g.*, United States v. O'Brien, 391 U.S. 367, 377 (1968); Konigsberg v. State Bar, 366 U.S. 36, 50-51 (1961).

82. 391 U.S. at 383-84. *Accord, e.g.*, United States v. Orito, 413 U.S. 139, 144 (1973).

to erotic material in *Mini Theatres*, *LaRue*, or *New York Liquor Authority v. Bellanca*.[83] It is also evident in the Court's election *not* to use *O'Brien* for the partially protected material in commercial advertising cases.[84] The reason is that, for partially protected expression but not for *O'Brien* expression, it is proper for the governmental interest both to be related to the regulation and restriction (although not the suppression) of partially protected speech, and to fail to use the least restrictive means (although the regulation must be narrowly drawn) to accomplish the governmental interest in regulation or restriction.

In any event, the *O'Brien* test was misapplied by the Ninth Circuit. It mischaracterized as a legislative motive test the language about a "governmental interest unrelated to the suppression of free speech," contrary to the express *O'Brien* repudiation of any assessment of legislative motive or purpose.[86] Further, the Ninth Circuit's application of *O'Brien* conflicts with that of Justice Powell in *Mini Theatres*.[87]

B. *The Legitimate State Interest Test or the Commercial Advertising Test Applies to Regulation of Erotic Material.*

Regulation of partially protected commercial advertising is subject to a lower level of judicial scrutiny than regulation of fully protected speech and press,[88] so that broader regulation and restriction is possible than for fully protected expression.[89] For commercial advertising, this Court has applied both a special test, requiring a "substantial" governmental

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83. *See* 427 U.S. at 63-73; 409 U.S. at 114; 452 U.S. at 715-18; *cf.* Schad v. Borough of Mt. Ephraim, 452 U.S. at 68-69 n.7 (mentioning but not applying *O'Brien* test).

84. Section III(B) *infra*.

86. 391 U.S. at 383-84 ("this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive").

87. 427 U.S. at 79-82. *E.g.*, Hart Book Stores, Inc. v. Edmisten, 612 F.2d at 829-30.

88. *E.g.*, Ohralik v. Ohio State Bar Ass'n, 436 U.S. at 457.

89. Section II(A) *supra*.

interest and regulation "not more extensive than is necessary to serve that interest,"[90] and a legitimate state interest test[91] with merely a rational relation between the regulation and that interest.[92] Whichever is used, it does not include the requirements of the *O'Brien* test for a "governmental interest . . . unrelated to the suppression of free expression" or for the least restrictive means of achieving that interest.

Regulation of partially protected privileged defamation also appears to come under a legitimate state interest test, because "the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual," in order

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90. Central Hudson Gas & Elec. Corp. v. Pub. Service Comm'n, 441 U.S. 557, 566 (1980) ("In commercial speech cases, then, a *four-part analysis* has developed. [i] At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. [ii] Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, [iii] we must determine whether the regulation directly advances the governmental interest asserted, [iv] and whether it is not more extensive than is necessary to serve that interest.") *Accord*, Bolger v. Youngs Drug Products Corp., ___ U.S. ___, 77 L.Ed.2d at 478-79.

91. *E.g.*, Friedman v. Rogers, 440 U.S. at 10 n.9 ("legitimate regulatory interests"); In re Primus, 436 U.S. 412, 422 (1978); Bigelow v. Virginia, 421 U.S. at 826; Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. at 389; *see* Members of City Council v. Taxpayers for Vincent, ___ U.S. ___, 104 S.Ct. 2118 (1984); Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85, 92 n.6 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. at 771-72 & n.24. *See generally* Note, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 44 U. CHI. L. REV. 205 (1976).

92. *E.g.*, Ohralik v. Ohio State Bar Ass'n, 436 U.S. at 464 (permitting prophylactic measures for commercial advertising regulation); Commonwealth v. Sterlace, 481 Pa. 6, 14, 391 A.2d 1066, 1070 (1978) (no least restrictive means requirement for commercial advertising regulation); *cf.* Moore v. City of E. Cleveland, 431 U.S. 494, 500 (1977) (limitation on multifamily use only had "tenuous relation to alleviation of the conditions" the state interest addressed).

to implement the "legitimate state interest in compensating private individuals for wrongful injury to reputation."[93]

Regulation of erotic material, because of its only partial protection, should also be subject to the legitimate state interest test (or minimal scrutiny), or at most to the commercial advertising test. This Court's plurality opinion in *Mini Theatres* appears to have applied a legitimate interest test to the regulation of erotic material there,[94] and appears to have found the restriction on location justified by the city's legitimate interests in "preserving the character of its neighborhoods" and "attempting to preserve the quality of urban life."[95] *Mini Theatres* appears to have required only a rational relation, rather than the *O'Brien* test's least restrictive means or the commercial advertising test's "not more extensive than necessary" requirement, because it said many means would be permissible.[96]

93. Gertz v. Robert Welch, Inc., 418 U.S. at 347-48. *See, e.g., id.* at 345-46; New York Times Co. v. Sullivan, 376 U.S. at 279-80 (state interest in compensating public figures for malicious defamation); Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967) (plurality opinion).

94. *See* 427 U.S. at 71-72; *e.g.*, Hart Book Stores, Inc. v. Edmisten, 612 F.2d at 831 n.13 ("The *Mini Theatres* plurality apparently considered that classification of sexually explicit materials would invoke only minimal scrutiny, 427 U.S. at 70-73."); County Bd. v. Richards, 217 Va. 645, 648, 231 S.E.2d 231, 233, *vacated on other grounds*, 434 U.S. 5 (1977) (per curiam) (*Mini Theatres* applied legitimate interest test); Comment, *Constitutional Law—Explicit Sex and the First Amendment*, 42 Mo. L. Rev. 481, 486 (1978) (same). *See also* New York State Liquor Auth. v. Bellanca, 452 U.S. at 718 ("a reasonable restriction" on topless dancing in establishment with liquor license); *id.* at 717-18 (finding sufficient factual basis, if any is required, in a short legislative memorandum).

95. *See* 427 U.S. at 71-72. *E.g.*, Airport Book Store, Inc. v. Jackson, 242 Ga. 214, 248 S.E.2d 623, 628 (1978) (applying "legitimate purpose" test to adult establishment regulation); Loewy, *A Better Test for Obscenity: Better for the States—Better for Libertarians*, 28 Hastings L.J. 1315, 1320 (1977) ("Any regulation which is reasonably related to a legitimate state objective and does not significantly impede presentation of or access to sexually explicit material is constitutional.")

C. *That Test for Partially Protected Speech Is Met by Renton's and Other Regulations of Erotic Material.*

Legitimate governmental interests in regulation under the police power,[97] and in regulation of external costs or spillover effects,[98] justify this ordinance for pornography zoning. *Mini Theatres* characterized the Detroit ordinance as land "planning" that addressed "secondary effect[s] . . ., not the dissemination of 'offensive' speech," and as "land-use regulation" or "zoning."[99] External costs of adult establishments include possible neighborhood deterioration, property value impairment, crime proliferation, unhealthful conditions, and moral debauchery.[100] A rational relation exists between por-

96. "[T]he city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." 427 U.S. at 71 (plurality opinion).

97. *E.g.*, Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974) (preservation of residential neighborhoods); Paris Adult Theatre I v. Slaton, 413 U.S. at 58 (protection of "the quality of life and the total community environment"); Barsky v. Board of Regents, 347 U.S. 442, 449 (1954) (guarding public safety and health).

98. *E.g.*, Kovacs v. Cooper, 336 U.S. 77, 87-89 (1949) (plurality opinion) (regulating volume of public speech); *see* California v. LaRue, 409 U.S. at 117 n.4 (dictum) (same).

99. *Id.* at 62, 71 (plurality opinion); *id.* at 73, 74 (concurring opinion).

100. *E.g., id.* at 55 (plurality opinion) (expert testimony that concentration "adversely affects property values" and "encourages residents . . . to move elsewhere"); *id.* at 82 (concurring opinion); Northend Cinema, Inc. v. City of Seattle, 90 Wash.2d 709, 585 P.2d 1153, 1156 (1978) (en banc) ("location of adult theaters has a harmful effect on the area and contribute[s] to neighborhood blight"), *cert. denied*, 441 U.S. 945 (1979); Airport Book Store, Inc. v. Jackson, 242 Ga. 214, 248 S.E.2d at 226-27 ("a vice squad officer testified as to numerous arrests of [adult] bookstore customers for solicitation of sodomy, sodomy and public indecency occurring in the adult mini motion picture theaters (peep machines) located in the rear of four bookstores"); Los Angeles Dept. of City Planning, Study of the Effects of the Concentration of Adult Entertainment Establishments in the City of Los Angeles 5 (City Plan Case No. 26475, City Council File No. 74-4521-S.3,

nography zoning and these legitimate governmental interests under the police power. Although the Detroit city council only heard testimony from a single expert,[101] this Court in *Mini Theatres* did not question the sufficiency of that evidence to support the zoning ordinance or police power regulation there.[102] Similarly, in *Village of Belle Terre v. Boraas*,[103] the zoning limitation on multiple family habitation in a single dwelling was found rationally related to legitimate interests in relieving urban congestion and noise and advancing family values and clean air, even though it was not the least restrictive or most effective means.[104]

1977) ("Businessmen, residents, etc. believe that the concentration of adult establishments has adverse effects on . . . the quality of life . . .. Among the adverse effects on the quality of life cited are increased crime; the effects on children; neighborhood appearance, litter and graffiti."); Comment, *Developments in the Law—Zoning*, 91 HARV. L. REV. 1427, 1568 (1978).

101. Nortown Theatre Inc. v. Gribbs, 373 F.Supp. 363, 365 (E.D. Mich. 1974), *rev'd sub nom.* American Mini Theatres, Inc. v. Gribbs, 518 F.2d 1014 (6th Cir. 1975), *rev'd*, 427 U.S. 50 (1976); *e.g.*, Note, *Anti-Pornography Laws and First Amendment Values*, 98 HARV. L. REV. 460, 477 (1984) ("in *Young v. American Mini Theatres*, a pluraility of the Court required only a 'factual basis' for the city council's conclusion that the presence of adult theaters caused neighborhood deterioration").

102. *E.g.*, Genusa v. City of Peoria, 619 F.2d 1203, 1211 (7th Cir. 1980) (sufficient factual basis in experience of other cities); Hart Book Stores, Inc. v. Edmisten, 612 F.2d at 828-29 n.9 (sufficient basis in one inspector's visit at five establishments); *cf.* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 61 (1973) ("From the beginning of civilized societies, legislators . . . have acted on various unprovable assumptions," and "[n]othing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data."); Kaplan v. California, 413 U.S. 115, 120 (1973) (same).

103. 416 U.S. 1 (1974).

104. *Id.* at 8. "[W]e cannot say that legislative action is rendered irrational by its choice of a less efficacious and less powerful approach than the Constitution might permit." Hart Book Stores v. Edmisten, 612 F.2d at 830.

CONCLUSION

This Court should hold emphatically that pornography zoning and extensive regulation of adult establishments is constitutional. Only partial protection of the First Amendment extends to nonobscene erotic material. No impermissible burden on such erotic material results from most restrictive regulation that would impermissibly burden fully protected speech. A sufficient justification for most regulatory burdens is present under the legitimate state interest test or the commercial advertising test, in contrast to the *O'Brien* test or the compelling interest test. These points are also true of commercial advertising, which also is only partially protected.

The "First Amendment . . . was not intended to be the death-knell of cities" or to condemn governmental efforts "to prevent its neighborhoods from becoming sex-oriented, crime-ridden wastelands."[105] For the reasons discussed in this brief, the decision of the Ninth Circuit should be reversed.

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105. American Mini Theatres, Inc. v. Gribbs, 518 F.2d at 1025 (dissenting opinion), *rev'd*, 427 U.S. 50 (1976).

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